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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

TERRITORY OF OKLAHOMA.

BRIEF FOR PLAINTIFF IN ERROR.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.

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Statement of the Case.

At the May term of the District Court of the Second Judicial District of the Territory of Oklahoma, an indictment for murder in one count was returned by the grand jury of Washita County, which charged that plaintiff in error—

> "On the thirteenth day of April, in the year one thousand nine hundred and one, in the county of Washita and Territory of Oklahoma aforesaid, did purposely, wilfully, and feloniously, with malice aforethought, and without authority of law, and with a premeditated design then existing in the mind of the said John New, to effect the death of H. F. Doyle, then and there with a certain Winchester rifle, loaded with gunpowder and certain leaden bullets, shoot a bullet into the body of him, the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of said H. F. Doyle, of which mortal wound so inflicted and so made, in the

manner and form and with the purpose aforesaid, the said H. F. Doyle, on the said 13th day of April, one thousand nine hundred and one, and in said county of Washita, did die, as was intended by the said John New as aforesaid he should do, and so the grand jurors aforesaid on their oaths aforesaid do say and find that the said John New, in manner and form aforesaid and by the means aforesaid, did then and there purposely, wilfully, and feloniously of his malice aforethought and without authority of law, and with the premeditated design to effect the death of him, the said H. F. Doyle, the said H. F. Doyle did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of Oklahoma" (Rec. pp. 16–17).

The indictment was signed by the county attorney; it was found, and the proceedings upon it in the trial court were had under laws enacted by the legislative assembly of the Territory (Compiled Statutes of Oklahoma, 1893).

The general charge of the trial court was given to the jury in the form of separate instructions, which were numbered. To nearly all of them the defendant excepted (Rec. pp. 93–99). He also excepted to instructions given at the request of the Territory (Rec. pp. 99–100), and to the modification by the court, before giving them of instructions 1, 3, 4, requested by him, and to the refusal of the court to give instruction 5, requested by him (Rec. pp. 93, 101, 102.)

The jury found the accused guilty of murder, and, under section 2085 of the compilation, fixed his punishment at imprisonment for life at hard labor (Rec. p. 105). The section provides that the punishment of every person convicted of murder shall be death or imprisonment for life, and requires the jury in the case of a verdict of guilty to designate in their verdict in which one of these ways the person convicted shall be punished.

A motion for a new trial was made by the defendant,

assigning as grounds therefor that the court erred in misdirecting the jury in matters of law; that the instructions tended to confuse the jury as to the law of the case; that the verdict was contrary to the law and to the evidence; that the court erred in giving certain instructions, part of its general charge; in giving instructions requested by the Territory; in modifying certain instructions requested by the defendant; and in refusing to give instruction 5, requested by the defendant. Other grounds were also assigned as follows:

> "Fourth. The court erred in failing to charge the jury that under the law it might convict the defendant of manslaughter in the first degree.
>
> "Fifth. The court erred in weighing the evidence in said trial and in taking from the jury the duty of determining in their verdict the degree of homicide, of which the defendant should be convicted, if of any degree.
>
> "Seventh. The court erred in failing to state in its instructions to the jury, the issues of fact submitted to the jury for its consideration" (Rec. pp. 106, 107).

The court overruled the motion for a new trial and the defendant excepted, and thereupon the court sentenced him to imprisonment for life at hard labor, to which "judgment and sentence" he also excepted (Rec. p. 108).

A motion in arrest of judgment was made by the defendant on the ground that the indictment "does not state facts sufficient to constitute a public offense" (Rec. p. 107).

The court took no action upon this motion, except such as was involved in the imposition of the sentence.

An appeal was taken to the Supreme Court of the Territory, pursuant to sections 4881 and 5318 of the Compiled Laws of the Territory; the judgment was affirmed by that court, and the present writ of error was sued out to review its action.

The Evidence at the Trial.

The record contains all the evidence adduced at the trial on behalf of the parties. As to the immediate circumstances of the difficulty which resulted in the death of Doyle, from its beginning to its conclusion, four witnesses only testified, viz: W. A. Reeves, also known as Dick Reeves, whose testimony was confined to the early part of it; G. B. Trotter and his wife, whose testimony was confined to the latter part of it, and New, the plaintiff in error.

Such parts of the evidence as are material to the questions involved may be summarized as follows:

The farms of New and Trotter were directly opposite each other, on a road running east and west, and New's gate was at the intersection of this road and the road running north and south, as indicated on the plat inserted between pages 70 and 71 of the record.

Reeves testified for the prosecution (Rec. pp. 51 to 61) that he and Doyle were returning from a place called Granite, 20 or 22 miles away; were in a wagon and Doyle was driving; as they approached New's place from the west, witness saw New at a distance of about 125 yards; thought he, New, was working on his fence; said to Doyle, "Yonder is John New now, working on his fence;" New looked toward them; they drove on; New looked a second time; while not expecting trouble himself, witness knew the two men were liable to have it from what he had "heard and seen;" New moved west along the fence ten or twelve steps; witness said to Doyle, "Henry, I am afraid you are going to have trouble this evening;" Doyle made no reply to anything witness said; New reached down, picked up his gun, and fired about as quick as he could; both jumped out of the wagon; Doyle had line in each hand; New fired again; witness ran west and then south; the team broke away from Doyle and the dust flew around Doyle once or twice at the crack of the gun; saw New put his gun on the fence and take deliberate aim at Doyle; saw Doyle "go down on his right

leg;" "seen" one or two more shots; Doyle went on going west toward Trotter's and New went in same direction on inside of his fence; Doyle and New disappeared going to Trotter's house; witness looked back as he, witness, was running.

The following questions were asked Reeves on cross-examination:

Q. Did you not tell him (W. J. Burrows) in Salyer (Texas), that you and Doyle were coming along the road and saw New and you said, "yonder is that fellow now, you had better look out," and then Doyle began to get his pistol loose; it was pinned in his inside vest pocket, and New went down and got his gun and began to shoot, and you jumped out and run like hell, and Doyle kept trying to get his gun out and hold his team?

A. No, sir (Rec. p. 59).

Q. Did you not say to him (Mr. Harper), "we were all carrying guns for each other, but I didn't think it would amount to anything; it would just be a bluff?"

A. I didn't say it (Rec. p. 59).

Q. I will ask you if you didn't go to Mr. Trotter's house, and in the presence of Charlie Trotter and the old gentleman, and your brother Solon was with you, if you did not go to Trotter's house and ask him if he ever heard New say anything about you or about you and Solon, and he said no, and you spoke up and said he had been talking about you, and you had a good notion to go up to his house and call him out and give him a beating?

A. I said that; I didn't say anything about beating him (Rec. pp. 59, 60).

Q. Did you not tell him (R. E. Tilford) in Port that you was going down to Combs and stay until the small pox scare was over at your place?

A. I don't remember it.

Q. Did you not tell him that you was going to raise a little hell; he asked you what, and you said, "you will hear of it," and you said, "I am going to run John New off," and he said, "John may not run," and you said, "I don't care a damn; I will run him off or kill him?"

A. No, sir; I never said that (Rec. p. 60).

G. E. Trotter testified for the prosecution (Rec. p. 36):

That Mr. Kites came to his house with a wagon and called for some hay that the witness let New have, and witness went to the hay stack to show him how to get in without running over some trees; heard some shooting commence west of his house; went back to house; saw Doyle's team coming by the house; saw Doyle and heard a gun fired and Doyle grabbed his right leg and went down on his right knee; he rose and went on; saw Doyle coming through the fence; Doyle said, "Don't let him kill me;" saw New running down the fence on the inside of his (New's) pasture; met New in the road and said to him, "This will never do;" he slung witness loose saying, "God damn you, turn me loose;" overtook him and witness' wife took hold of him, and they went in the room and witness' wife said, "Don't kill him;" New said, "Turn me loose and I won't;" witness expected them to go to shooting and he and his wife went out; after they got out heard a shot; saw New standing in the door; he took a horse out of the wagon, got on it and rode off. Mrs. Doyle and her daughter Gracie came up; found Doyle sitting in the house, his hands in his lap and his feet stretched out; saw wound, a hole in his jaw; witness knew nothing of the circumstances under which the shooting began (Rec. p. 45). The room that New and witness and his wife went into was a shed or back room; the room that Doyle was in was a room fourteen feet square.

Mrs. Trotter testified for the prosecution (Rec. p. 47) to the same state of facts as her husband.

Dr. James McLane, the only witness examined as to the cause of the death, testified for the prosecution (Rec. p. 49), that he saw Doyle after his death and made some examination of him. He was lying on a mattress; a bullet went in his left cheek and came out on the side of the neck and

went down in the top of the shoulder. There was another wound in the upper and back part of the thigh, coming out at the front side; and the skull was crushed in at the center; looked as if it had been struck by the gun barrel or something of the kind.

Q. What, in your opinion, caused the death of Mr. Doyle?

A. I can not tell you whether it was caused by one of the gunshot wounds or the stroke on the head. I I can not tell that.

Q. You can not tell which of the wounds caused his death?

A. No, sir.

Q. Is it your opinion that one of these wounds caused his death?

A. Yes, sir.

J. Lightfoot testified for the prosecution (Rec. p. 68) that he had heard shooting; met New in the road about 200 yards west of Mr. Trotter's house; said howdy, and asked what had occurred; what was the matter. New told him that he was out there at work on the fence, and Doyle and Reeves came down the road, and just before they got to him they reached for their guns, and New said he knew there had to be something done or was going to be something done; that he (New) stepped up to where his gun was and picked it up, and when they got pretty close to him "he just turned loose," and that he killed Doyle in Trotter's house.

Q. Anything else?

A. I said, "I am awful sorry;" and he said, "Yes, I am not sorry I done the work, but I am sorry I had it to do."

J. W. Miller testified for the prosecution (Rec. p. 70) that he was the sheriff of Washita County and arrested New in Greer County a week after the shooting, and that New was then sick.

Thomas J. Hampton testified for the defense (Rec. p. 71) that he was a justice of the peace and held an inquest over the body of H. F. Doyle; that he made an examination of the body and found a pistol in the inside pocket of his vest, on the right side; that it was fastened with a safety pin; that the point of the pin was unfastened and that the pistol was loaded. (By the Court: Take it out and let the sheriff empty it.)

The witness further testified that it required some effort to get the pistol out of the pocket; it seemed to be cankered and would not slip easily.

Mr. Harper testified for the defense (Rec. p. 73), that Reeves told him after the shooting that they were all carrying their guns for each other, but that he, Reeves, didn't think it would amount to anything; that it would be just a bluff.

Charlie Trotter testified for the defense (Rec. p. 74), that about nine months before the shooting, Reeves and his brother came to the place of witness' father, and in witness' presence asked his father if he had heard New say anything about them, to which his father replied no; and that Reeves said, "he has been talking about us," and that they were in a good notion to go there and call him out and beat him.

G. E. Trotter testified for the defense (Rec. p. 76), that Reeves and his brother came to his place before the killing, when his son was present, and asked if he (Trotter) had heard John New say anything about them, to which witness replied no, and they said he had been talking about them, and they had a notion to go up there and whip him.

Mr. Burrows testified for the defense (Rec. p. 76), that on the day of Doyle's funeral, in Salyer, Texas, Reeves said to him that he and Doyle were coming along the road and saw New, and he told Doyle, "Yonder is that fellow now; you had better look out," and that Doyle began to get his pistol loose; it was

pinned in the inside pocket of his vest, and New went and got his gun, and that he (Reeves) jumped out and run like hell, and that Doyle kept on trying to get his gun out until New shot one of his horses.

W. J. Tilford testified for the defense (Rec. p. 78), that he met Reeves on the morning before the killing of Doyle, and that Reeves said he was going to Combs until after the small pox scare was over, and that he was going to raise a little hell, and said witness would hear of it; he said he was going to run John New off, and witness said, "maybe John won't run," and he said, "if he don't I will kill him." The witness further testified (Rec. p. 86), that about the first of March he met Doyle, about a half mile east of Combs, and Doyle asked where witness had been, and witness replied, "down to New's." Doyle said, "I want to ask you one question: did you ever hear him say anything about me?" Witness replied, "no." Doyle said, "he does talk about me, and I will stop it; if I ever get him in the right place, some powder will burn."

W. F. Tharp testified for the defense (Rec. p. 86) that he was at Doyle's house about May 1, 1900, and that Doyle said that he and New had had some trouble and had had a trial. Doyle said he could not get justice in the courts and was going to take the thing in his own hands, and was going to revenge himself; and that Doyle then showed a large blue-looking pistol, and said he had got it to revenge himself with and to protect himself with; he was talking about John New and he said that he carried the pistol everywhere he went; he said that he and New had had some trouble in a field, and that he, Doyle, then had his pistol in his boot leg, an unhandy place, and he could not get it out or he would have killed him that day. Saw Doyle after that, and Doyle asked if witness had a place yet; witness replied that he had not. Doyle said he knew where witness could contest and get one; that he could contest New and get his place. Witness told

Doyle he had better drop the trouble; but Doyle said he would not do it, it had gone too far; Doyle said he had intended to kill New ever since he accused his (Doyle's) brother Jim of stealing a horse in Collin County some time before.

John W. Howell testified for the defense (Rec. p. 88) that he was at Doyle's house in August, 1900; stopped with him one night; was looking over the country for a place, and asked Doyle for information in regard to where he could find a place, and told him about the amount he had to pay for it; Doyle said he could tell him of a claim that would "beat buying one;" Doyle spoke of some difficulty and said that he regretted that he didn't kill him (evidently referring to New) at that time, and Doyle said if the same opportunity was afforded again he would do it.

W. A. Powers testified for the defense (Rec. p. 90) that he met Doyle in April, 1900; that witness asked him if he was still at outs with New and said to him that he had better drop it, but Doyle said no; he would kill him first; that witness communicated this to New and told him to watch Doyle, that he might kill him, that he appeared to be pretty mad at him.

Mr. McCarthy testified for the defense (Rec. p. 90) that he had heard Doyle say that he would kill New before the year was out, and that this was in July or August, 1900.

John Ferris testified for the defense (Rec. p. 91) that some time in May, 1900, he was at Doyle's house with Tharp, and that Doyle said he had tried the court, justice of the peace, and had failed to get justice; that Doyle showed them a black-handled pistol in his vest pocket and said he was going to kill New. He said that New had intimated that his (Doyle's) brother had stolen some horses and that he (Doyle) had made up his mind to kill him ever

since he made that statement; that witness had seen Doyle several times with a shot gun, and that once Doyle told him it was loaded with buck shot.

C. W. Tharp testified for the defense (Rec. p. 79), that he had lived a neighbor of New's in Collin County for ten years, and that his reputation as a quiet, peaceable, law-abiding citizen generally was good.

Mr. Brown testified for the defense (Rec. p. 79), that he had known New for twenty years, and that his general reputation for being a law-abiding, quiet, peaceable citizen had always been good.

Wylie Williams testified for the defense (Rec. p. 80), that he had known New for nearly three years; that his general reputation as a peaceable, inoffensive, law-abiding citizen had been good.

Mr. Mumsey testified for the defense (Rec. p. 81), that he had known New for twenty years, and that his general reputation as a peaceable, inoffensive, law-abiding citizen was good so far as he had ever heard.

Dr. Clay testified for the defense (Rec. p. 81), that he had known New for fourteen or fifteen years, and that his general reputation in the community for being a quiet, peaceable, inoffensive, law-abiding citizen was good.

John Perkins testified for the defense (Rec. p. 82), that he had known New all the latter's life, nearly twenty-seven years; for five years had been his next door neighbor; that New's general reputation as a quiet, peaceable, law-abiding citizen was as good as that of any person in the county.

New, the plaintiff in error, testified in his own behalf (Rec. p. 82), that he never had any serious trouble in his life with any man except Doyle; that he had

been sick with the grip and then with the measles, and had been out only about three days; thought he would go and kill some ducks; didn't succeed in killing any; had had some boys working on his fence; they had not got it quite finished; had put his gun down and was working on the fence himself when he looked up and saw Doyle and Reeves coming; he kept on working and looked up the second time; at this time they were within about forty or fifty yards; saw Doyle reach in his bosom and begin to jerk at something, he, New, supposed to be a pistol; reached down and picked up the Winchester and fired; had been told of threats made at different times by Doyle, and Mr. Powers had told him that Doyle had said that if things kept coming the way they were he was going to kill him, New; fired because he was afraid Doyle would kill him; Doyle had threatened to do so, and Doyle reached into his bosom and he was afraid Doyle would kill him; at the first shot Doyle and Reeves jumped out of the wagon on the opposite side, and he, New, shot the second time; after the team passed, Doyle was in plain view, working at his breast trying to get his pistol out and he, New, shot again; Reeves had turned and run back; witness quit shooting when Doyle was about a hundred yards away; Doyle then checked up, turned and looked back, and commenced working at his breast again like he was trying to get his pistol out; witness then laid his gun on a post and shot him; thought he hit him; Doyle throwed his hand on his leg; witness followed him to the house because he was afraid Doyle would turn and shoot him; Doyle was not out of shooting distance; he promised Mrs. Trotter not to go into the house because he was afraid Doyle would shoot through the door or out of the door and kill witness while they were holding him. When he went into the room Doyle was on the floor still working at his breast; he then shot Doyle, and struck him with the gun in the head, and turned and walked out; took one of his horses from the team that had gone down for a load of hay and rode off; went away for safety because Reeves and his brother and his father were all enemies

and witness was afraid they would come up home and kill him, or witness would have to kill some of them.

Assignments of Error.

1.

The court erred in holding that instruction 15½ in the general charge of the trial court, given to the jury of its own motion (Rec. p. 97), correctly stated the law applicable to the evidence and was properly given.

2.

The court erred in holding that instruction 16 in said general charge (Rec. pp. 97–98) correctly stated the law applicable to the evidence and was properly given.

3.

The court erred in holding that instruction 17 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

4.

The court erred in holding that instruction 18 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

5.

The court erred in holding that instruction 19 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

6.

The court erred in holding that instruction 2 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury by the trial court.

7.

The court erred in holding that instruction 3 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury by the trial court.

8.

The court erred in holding that instruction 4 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury.

9.

The court erred in holding that the refusal of the trial court to give instruction 1 of the instructions requested by the defendant (Rec. p. 101) was proper, and that said instruction, as modified by the trial court and given to the jury, correctly stated the law applicable to the evidence.

10.

The court erred in holding that the refusal of the trial court to give instruction 3 (Rec. pp. 101, 102) of the instructions requested by the defendant was proper, and that said instruction, as modified by the trial court and given to the jury, correctly stated the law applicable to the evidence.

11.

The court erred in holding that the refusal of the trial court to give instruction 4 of the instructions requested

by the defendant (Rec. p. 102) was proper, and that said instruction as modified by the trial court and given to the jury was a correct statement of the law applicable to the evidence.

12.

The court erred in holding that instruction 5 of the instructions requested by the defendant (Rec. p. 93) was not a correct statement of the law applicable to the evidence, and that the refusal of the trial court to give it was proper.

13.

The court erred in holding that there was not sufficient evidence in the case tending to prove a lower grade of offense than murder, and that the trial court properly confined its instructions to the jury to the question of murder or self-defense.

14.

The court erred in holding that under the evidence it was not the duty of the trial court to instruct the jury as to manslaughter and to advise them that they might convict or acquit the defendant of murder or convict him of manslaughter as they might find the facts to be.

15.

The court erred in holding that even if there was evidence in the case tending to prove a lower grade of crime than that of murder, and the fact was apparent to the trial court, nevertheless it was not the duty of the trial court to instruct the jury upon such lower grade, unless requested by the defendant to do so.

16.

The court erred in holding that the motion of plaintiff in error for a new trial was properly overruled and a new trial refused by the trial court.

17.

The court erred in holding upon an examination by it of the entire record that the instructions given were fair and ample to properly cover all questions presented by the evidence, and that the accused had a fair and impartial trial.

18.

The court erred in affirming the judgment of the trial, court, and in not reversing it and remanding the case to the trial court with instructions to grant a new trial.

ARGUMENT.

The argument will be addressed to the establishment of the following propositions:

1. The trial court should have granted instruction 5 requested by the defendant, because of the failure of the proof to show that the death was caused by a gun shot wound as charged in the indictment, and not by a blow on the head.

2. Upon the trial court's theory of the case, that under the evidence one issue of fact only, murder or self-defense, was presented for the consideration of the jury, the instructions were erroneous and misleading as to the law of self-defense.

3. An instruction as to manslaughter would have been proper under the evidence, and it was the duty of the trial court to have given it, of its own motion, in the absence of a request by the defendant to do so.

4. Even if not bound, without such request, to have given such instruction, it was the duty of the trial court under the laws of the Territory, when the prejudicial omission was called to its attention by the motion for a new trial, to have granted the motion.

5. The trial court was without jurisdiction to try the case.

It is obvious that the establishment of either of these propositions necessitates a reversal, as involving error prejudicial to the defendant.

1. Failure to Prove Charge as Laid.

The trial court refused to grant instruction 5 of the instructions requested by the defendant, and the refusal is the basis of the 12th assignment of error. The instruction reads as follows (Rec. p. 93):

> "You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gunshot wounds or from the effects of injuries inflicted by a blow on the head by some deadly instrument, then it is your duty to acquit the defendant."

Dr. James McClane, a witness called by the prosecution, was the only witness by whom it was sought to prove the immediate cause of death. He testified (Rec. pp. 50, 51), that he was a physician; that he examined the dead body of Doyle on the day he was killed; that he found a wound caused by a bullet which entered the left cheek and came out on the side of the neck, and another wound in the upper and back part of thigh which came out on the front side, and that the head of the deceased was crushed in at the center as if he had been struck by a gun barrel or something of the kind, and that as to the death of Doyle, *he could not tell whether it was caused from one of the gun-shot wounds or the stroke on the head*, and that in his opinion *one* of these wounds caused his death.

There was other testimony in the case as to these wounds, but no part of it bears upon the question whether the death was caused by one of the bullet wounds or by the blow on the head, or by both, a matter which it was for the jury alone to determine. There was absolutely no fact proved in

the case to justify even an inference by the jury that the death was caused by one of the gun shot wounds. The testimony of New was that the first shot was followed immediately by the blow on the head, and, if inference was allowable at all, it would have been more reasonable to attribute the death to the blow on the head than to either of the gun shot wounds, neither of which was in a place necessarily fatal.

In the predicament of the evidence, or of lack of evidence, the jury could not, if left to themselves, have found beyond a reasonable doubt that the death was due to one of the gun shot wounds. The trial court, however, did not leave the matter to them; it settled it for them; in instruction 17 of the general charge (Rec. p. 98), the court says, "If the jury believe from the evidence, beyond a reasonable doubt, that at the time the *fatal shot* in this case was fired," etc.; and in instruction 18 of the general charge (Rec. p. 98) the court, after referring to the *first* shot, uses the language, "Yet if they (the jury) further believe beyond a reasonable doubt that *before the fatal shot was fired, etc.*;" the "fatal shot" is also referred to in instruction 15½. It may be stated at this point that instruction 15½, which is the basis of the first assignment of error; instruction 17, which is the basis of the third assignment, and instruction 18, which is the basis of the fourth assignment, were erroneous as invading the exclusive province of the jury, in the respect mentioned. They were also erroneous in other respects, as will be hereinafter shown.

The instruction requested should have been given. It was clearly a case of not proved as to the charge laid. The rule is that the deceased must have died the same kind of death as is alleged in the indictment. The proof of the killing must be of the same species as that charged.

In Guedel *vs.* People, 43 Illinois, 227, the question under consideration was the same as the one presented here, that is to say, whether under an indictment for murder by shooting from a gun by means of powder and shot the State

could be permitted to prove a murder committed by striking the deceased with a gun upon the head. It was held it could not, as the proof did not agree with the allegation, in substance and general character. The court say:

> "The rule in regard to questions of this character is stated by Greenleaf with his customary precision as follows: 'An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description' (1 Greenleaf, section 65). In his third volume, section 140, he again says: 'It is sufficient if the proof agrees with the allegation in substance and generic character without precise conformity in every particular. Thus, if the allegation be that the death was caused by stabbing with a dagger, and the proof, etc., of killing by any other sharp instrument; but if it is alleged that the death was caused by a blow with a club or by a particular kind of poison or by a particular kind of suffocation and the proof be by killing of blow given by stone or any other substance or by a different kind of poison or another manner of suffocation, it is sufficient; if, as Lord Coke observes, the offense agrees with the effect of the indictment the variance in substance is not material, but if the evidence be of death in a manner essentially different from that alleged, as if the allegation be of stabbing or shooting and the evidence be of death by poisoning or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported.' We have consulted many of the text writers on this subject and the same rule in substance, with similar illustrations, is laid down by them all."
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> . . . . . .

The case of Anderson *vs.* The United States, 170 U. S. 490, is not in conflict with that of Guedel. The indictment alleged the murder to have been caused by shooting and drowning. This court held that the charge involved no inconsistency, and sustained the conviction although it did

not clearly appear from the evidence that death was due to one or the other or both causes. The court quotes from the opinion of Chief Justice Shaw in Commonwealth *vs.* Webster, 5 Cush, 295, as follows:

> "Take the instance of a murder at sea, a man is struck down, lies sometime on the deck insensible, and in that condition is thrown overboard; the evidence proves the certainty of a homicide by a blow or by drowning, but leaves it uncertain which. That would be a fit case for several counts charging death by blow, death by drowning, and perhaps a count charging death by both combined."

The court in its opinion also cites Com. *vs.* Desmarteau, 16 Gray, 1, in which one count of the indictment charged that the death was caused by blows, another by drowning, and the third by both, and the conviction sustained; also Com. *vs.* Macloon, 101 Mass. 1, in which it was held sufficient to allege in the indictment that the death was caused by a wound, exposure, or a starving, and it was held to be sufficient to prove that it resulted from all or any of them.

The following cases, in which a conviction was sustained, were also cited:

Joy *vs.* the State, 14 Ind. 139, where the indictment charged a death caused by holding a child in the flames, vapor, and steam until fatal injuries were inflicted. The second count charged that the fatal injuries were inflicted by blows, and the third count alleged that the death was caused by both of said causes.

Woodford *vs.* People, where the indictment charged the burning of a number of designated dwelling houses, and it was held that although the fact that the houses did not burn at the same time and that but one was set on fire, communicating therefrom to the others did not make the burning of each a separate offense.

State *vs.* Fox, 25 N. J. L. 566–601, where the indictment charged that the injuries causing death resulted from cut-

ting the throat of the deceased with a knife or a razor' it was in evidence by the testimony of a physician that there were mortal wounds in the throat of the deceased which must have been made with a sharp instrument, such as a knife or razor, from their appearance, and that the "cut was clean and not jagged;" there was also evidence as to other and different kinds of wounds. Objection was made that the State was permitted to prove a killing by other means than those described in the indictment, but the court held that the objection was not sustained in point of fact by the record; that the State having sustained the charge of the indictment by proof of the injury as therein alleged, it was competent to show the nature and extent of the injuries inflicted on the deceased.

State *vs.* Johnson, 10 La. Ann. 457, where the indictment contained two counts, one alleging death by beating and the other by drowning, and it was sought to compel the State to elect between the two counts, and the refusal of the court below to require such election was sustained, as the various modes were properly charged in different counts.

People *vs.* Colt, 3 Hill, where the indictment contained a count charging the striking and cutting deceased with a hatchet as the cause of death, and another count charging it to have been occasioned by striking him and cutting him with an instrument to the jurors unknown. The evidence tended to prove the death to have been caused from the discharge of a pistol. All the wounds found upon his person (Rec. p. 304) were such as might have been produced by a hatchet, except a small but apparently mortal one found on the side of the head. The conviction was sustained.

Jones *vs.* Georgia, 65 Ga. 621, where the indictment contained two counts, one for murder by strangulation and the other by burning. The body bore marks both of burning and strangulation.

Rogers *vs.* State, 50 Ala. 102, where the indictment

charged the killing by cutting off the head with a knife and by cutting off the head with an axe. The evidence tended strongly to establish the fact that the deceased had been killed in one of these modes. The conviction was sustained under the State code, and the rule laid down (1 Greenleaf Ev., section 165) that "If the proof agree with the allegation in substance and general character without precise conformity in every particular" it is sufficient. It was held that the charge of the court was not, under the particular circumstances of the case such a departure from the rule as to vitiate the charge and make it erroneous.

Gonzales *vs.* State, 5 Tex. App. 590, where the indictment charged, in one count, the infliction of a mortal wound with a pistol, and that the accused set fire to and burned the clothes of the deceased and thereby mortally burned him, and that of said mortal wounds he died.

It will be observed that in each of these cases there was a charge in the indictment which covered the cause of death as shown by the proof, in which respect they are different from the case at bar, where the charge of the cause of death is confined to a bullet wound from a gun. The county attorney and the grand jury had before them the two possible causes of death and might have laid a proper foundation, under the decisions, for proof tending to show a death caused in one or the other way, or in both. They elected to charge in one way only. The proof fails to support the cause of death as charged, beyond a reasonable doubt, and the failure is fatal.

2. The Instructions as to the Law of Self-defense Were Erroneous and Misleading.

The instructions presented to the jury but a single issue, that of murder or a killing in self-defense, and they were restricted to its consideration. Plaintiff in error contends that even upon the court's theory of the case the instructions of the court were erroneous and misleading.

The particular instructions to be considered in this connection are instruction 15½ of the general charge, upon which the first assignment of error is based; instruction 16 of the charge, upon which the second assignment is based; instruction 17 of the charge, upon which the third assignment is based; instruction 18 of the charge, upon which the fourth assignment is based; instruction 19 of the charge, upon which the fifth assignment is based; instructions 2, 3, and 4, given at the request of the Territory, upon which, respectively, the 6th, 7th, and 8th assignments are based; instructions 1, 3, and 4, requested by the defendant, with their modifications by the court, and upon which, respectively, the 9th, 10th, and 11th assignments are based.

Instruction 15½ (Rec. p. 97) announces two separate and distinct propositions, viz:

1. That if a man kills another through "*mere cowardice*" the law will not justify the killing on the ground of self-defense.

2. That if a man kills another "under circumstances which *are not in the opinion of the jury* sufficient to induce a well-grounded belief of danger of life or of great bodily harm in the mind of *an ordinarily courageous man*," the law will not justify the killing on the ground of self-defense.

By the first of these propositions the court imposed upon the jury the duty of determining whether the defendant would have acted differently, under the circumstances disclosed by the evidence, had he not been timid to the degree of cowardice, and of settling the matter of his justification in killing for or against him according to the conclusion which they might reach.

The jury were left to reconcile their differing individual standards of judgment as best they might, and to determine the purely speculative question without any fixed and definite rule for their guidance. Having reached a

conclusion adverse to the defendant on the question, nothing was left for the jury to do, under the instruction, but to find the defendant guilty. The jury if they had been permitted to do so might have found that the defendant, notwithstanding his timidity, was a reasonable man and that he acted in good faith upon what seemed to him to be a reasonable appearance of danger, although the jury did not from their standpoint believe that there was in fact such reasonable appearance of danger.

The same idea pervades both propositions, and there is no foundation for it in reason or authority. Neither courage nor cowardice is the standard by which the justification of the slayer is to be determined; he is to be judged as a *reasonable* man, whether he possesses or is lacking in courage (as the term may be understood by different men), and no matter to what degree; upon the question of justification, whether he was blessed in the one way or afflicted in the other, is immaterial; a man may be timid to the degree of cowardice and yet be a *reasonable* man.

The "ideal man" (who of course would be courageous) is not to be set up by the court "as the standard by which appearances are to be measured or the belief tested" in such cases.

> "There is not, of course, to be any inquiry as to whether he (the slayer) was a brave man or a coward, nor any kindred matters to be investigated."
>
> Batten *vs.* State, 80 Ind. 404.

The Indiana court, in considering in another case the question whether actual fear of great bodily harm without reasonable cause for it would excuse a killing, say that—

> "the criminal law holds sane men responsible for the ordinary exercise of their reason. It is a power common alike to cowards and those who know no fear. It is a guide to which both may apply if they wish to do so."
>
> Creek *vs.* State, 24 Ind. 153.

The Supreme Court of Georgia, in treating the same subject, say:

> "As to all these requests which were based upon the idea that the circumstances which attended the killing were such as to excite the fears of a drunkard or a coward or even of Mr. Golden, the law makes no discrimination. They must be such as to excite the fears of a *reasonable* man."
>
> Golden *vs.* State, 25 Ga. 533.

But while the fears of a timid man irrationally excited will not justify a killing, committed under a belief due to them of the necessity of such killing, to save the slayer from death or great bodily harm, such belief will reduce the killing to manslaughter, because it excludes the idea of malice.

The jury in the case at bar, as it was given to them by the court, were precluded from finding manslaughter.

The second part of the instruction is also objectionable in that it required the jury in reaching an opinion as to whether the circumstances were sufficient to induce "a well-grounded belief," to consider them from their own standpoint and not from that of the defendant.

In Batten *vs.* State, *supra*, numerous authorities are cited (Rec. p. 405) showing the settled doctrine to be that:

> "The guilt of the prisoner must depend upon the circumstances as they appear to him."

And see R. R. Co. v Jopes 120 U. S. 23-4.

Instruction 16 (Rec. p. 97) is divisible into two separate and distinct parts; the first is objectionable because the standpoint of the jury is substituted for that of the defendant in determining the existence of evidence "to justify" the defendant's fears and to justify the slaying as necessary. The second part is objectionable in ignoring the portion of the difficulty between the defendant and the deceased which took place before the last shot was fired, and its effect upon the defendant; and, again, in

requiring the jury in ascertaining grounds "for a reasonable belief" in the mind of the defendant *at the time* of the killing to determine the matter from their own standpoint and not from that of the defendant.

Instruction 17 (Rec. p. 98) is objectionable for the reason that the questions submitted are to be determined from the standpoint of the jury and not that of defendant.

Instruction 18 (Rec. p. 98) is objectionable upon the ground that while implying a belief on the part of New, at the time he fired the last shot, that his life or personal safety was in danger, it left the jury to determine whether it was reasonable or not from their own standpoint, and not from his.

Instruction 19 (Rec. p. 98) is in contravention of the decisions of this court. The undisputed evidence showed that the defendant was on his own premises, not far from his residence; that he was there for no evil purpose, and that he was engaged in the lawful occupation of fixing his fence, which bordered upon a public road; defendant's testimony was to the effect that while thus engaged the deceased and another, both his enemies, came along the road; that there had been ill feeling between the parties; that the deceased had made threats against his, New's, life which had been communicated to him; these threats, which were of the most violent kind and indicated the vindictive character of the feeling of the deceased towards New, were fully proved at the trial; that when near to him (New) the deceased put his hand to his breast and began jerking at his vest, as if endeavoring to get out what defendant supposed to be a pistol; that from the actions of deceased and the threats previously made by him, he, New, believed his life was in danger and fired at deceased under this belief; that in moving along the road the deceased kept up the effort to get his pistol out, and that he was endeavoring to get it out when New fired the last shot.

A loaded pistol was found in the vest pocket of the

deceased, in the removal of which even then some difficulty was experienced, owing to the manner in which it was fastened to the vest, facts which were strongly corroborative of New's testimony.

In Beard *vs.* United States, 180 U. S. 356–361, this court in a review of the authorities on the duty to retreat, quotes with approval the following from Runyan *vs.* State, 57 Ind. 80:

> "The weight of modern authority in our judgment establishes the doctrine, that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may without retreating repel force by force, and if in the reasonable exercise of his right of self-defense his assailant is killed he is justifiable."

The court also quotes with approval the following from East's Pleas of the Crown:

> "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony such as murder, rape, robbery, burglary and the like, upon either. In such cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing it is called justifiable self-defense."

The defendant under the evidence in his case was entitled to have the law as announced in case of Beard given to the jury by the court; as the law was actually given to the jury they were told that if in their opinion New could have withdrawn with safety to his life and person it was his duty to do so. In other words, if the jury should find that New might have fled with safety it was his duty to have fled, and to have done this no matter what his own reasonable belief as to the matter might be.

Instruction 2, granted at the request of the Territory

(Rec. p. 100), is clumsily expressed and calculated to mislead the jury; they are substantially if not in terms told that "murder" would be justified, if the person killed had made threats and at the time the "offense" was committed manifested by some act done an intention to execute them. The instruction was misleading as conveying the idea that every killing of a human being was "murder;" and again the instruction left it to the jury to determine from their own standpoint and not from that of the accused the sufficiency of the manifestation, as an indication of an intention to execute the threats.

This instruction and others excepted to were wanting as this court said in dealing with those in the case of Guorko *vs.* United States, 153 U. S. 190, "in the clearness that was required in order that the jury might not misapprehend the principle of law by which they were to be controlled."

Instruction 3, granted at the request of the Territory (Rec. p. 100), informs the jury that a person is permitted by law to defend himself from threatened injury to his person and is justified "in using all necessary and reasonable force to defend himself but no more than the circumstances reasonably *indicate* to be necessary." "Indicate" to whom and from what standpoint, that of the jury or that of the defendant? That of the jury was evidently intended, and the jury might well so have inferred.

Instruction 4, granted at the request of the Territory (Rec. p. 100), like every other instruction given in the case, relates to the justification of the defendant upon the ground of self-defense. It is objectionable in this, that it placed the question whether the deceased was in "terrified flight" before the jury, as one to be determined by them without regard to the impression made upon the mind of the defendant by the circumstances as they appeared to him, or his bona fide belief induced by them.

It is also objectionable in making the question of justification depend not upon the bona fide belief of the defendant

as to his danger and as to the reasonableness of the belief situated as he was, but upon the question to be determined by the jury whether the defendant had been "in pursuit of the retreating human being, *for such a time that he has time*, as a reasonable human being, to know that the person killed is in flight and not in fight," thus making a mere evidential circumstance, from which the absence of such bona fide belief might be inferred, the controlling factor in the determination of guilt or innocence of the crime charged, instead of defendant's actual belief.

If the defendant ought to have realized the fact that danger was past, but did not owing to his own fright, terror, anger, or heat of passion induced by the conduct of deceased and other circumstances in evidence, he could at most be properly convicted of manslaughter.

The giving of instruction 1, requested by the defendant (Rec. p. 101), as modified by the court was erroneous.

New had the right under the law to act upon appearances which reasonably indicated to him, situated as he was, that he was in danger of life or of severe bodily harm at the hands of the deceased, although in fact he was in no actual danger of either. Under the instruction as modified by the court, his justification is made to depend upon the evidence of actual danger, and of actual necessity for the killing by reason of it.

Hurd *vs.* People, 25 Mich. 425

In giving instruction 3, requested by the defendant, as modified, the court advised the jury that if they found from the evidence that the accused had threatened to kill the defendant and that the threats had been communicated to the defendant, and that the deceased did some act just prior to and at the time of the killing, which indicated to the defendant an intention on the part of the deceased to execute such threats, the defendant would be justified in taking the life of the deceased, but " this would not justify the

defendant in pursuing the deceased and killing him after the real or apparent danger was past."

The instruction as a whole was improper and prejudicial to the defendant; it assumed as a fact that there was pursuit in an objectionable sense and a killing by the defendant "after the real or apparent danger was past," and if this was not meant it still left it to the jury to determine from their own standpoint and not from that of the defendant and without regard to what might have been his reasonable belief, situated as he was, whether such danger was in fact past or not.

Instruction 4, requested by the defendant, as modified and given by the court (Rec. p. 102), by the addition of the words in parenthesis at the end of it, is erroneous.

The instruction, as requested, advised the jury that if they found from the evidence the defendant believed he was in danger of death or serious bodily harm from the deceased, and that such belief was based upon reasonable evidence of danger, and that he made the fatal assault while acting under such belief, they should acquit him, although, in fact, he was not in actual danger; and that they should acquit him if *they entertained a reasonable doubt upon the evidence* that the defendant actually believed he was in such danger.

By the qualification the matter of reasonable doubt was eliminated, and the instruction when considered in connection with instruction 4, granted at the request of the Territory, made defendant's acquittal dependent upon the actual and not apparent necessity of the killing.

3. The Trial Court Should Have Instructed as to Manslaughter Although Not Requested To Do So by Defendant.

All the authorities are to the effect that in a trial for murder it is error for the trial judge not to submit the question to the jury *when requested*, if the evidence tends to show the lower degree of crime.

In Stevenson *vs.* United States, 162 U. S. 313, this court said (Rec. p. 315), in speaking of the action of the trial court:

> "The ruling of the learned judge was to the effect that in this case the killing was either murder or else it was done in the course of self defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence and decided, as a matter of law, what, it seems to us, would generally be regarded as a question of fact, viz, whether under all the circumstances which the jury might from the evidence find existed in the case the defendant was guilty of murder or whether he killed the deceased not in self defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self defense, and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law, and against the defendant;"

and (p. 316):

> "If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury."

The court (p. 315) emphasizes this view by saying:

> "The evidence might appear to the court to be simply overwhelming to show that the killing was, in fact, murder and not manslaughter, or an act performed in self defense, and yet so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury and can not be matter of law for the court."

In Lawson *vs.* Territory, 8 Ok. 1, under an indictment for murder, the trial court instructed the jury that they must find either murder or justifiable homicide, and—

> "that in this case there is no evidence to support or

justify a verdict of manslaughter in the first degree, manslaughter in the second degree, or excusable homicide."

This was held to be error on the facts of the case, the Supreme Court of the Territory saying:

> "There was some evidence from which the jury might have said that the defendant was only guilty of one of the degrees of manslaughter. All of the facts were before the jury and it was their province to say whether the homicide was premeditated with the design to effect the death of the deceased, or by means of a dangerous weapon, or unnecessarily while resisting an attempt by the deceased to commit a crime. The trial court seems to have proceeded upon the theory that after the homicide was proved beyond a reasonable doubt to have been committed by the defendant, it was the duty of the defendant to introduce evidence to show that it was only manslaughter.
>
> "This is true in our Territory by virtue of our statutes, section 5227; . . . but notwithstanding the statutory provision, who is to determine when the defendant has proven sufficient circumstances in mitigation that will reduce the killing to manslaughter? If any evidence is introduced which tends to reduce the killing to manslaughter, it is a matter for the jury to determine whether it is murder or manslaughter. The views herein expressed are supported by numerous and very able authorities."

The defendant could not waive the not doing of an act, essential under the law, in his prosecution:

> "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty can not be dispensed with or affected by the consent of the deceased, much less by his

mere failure, when on trial or in custody to object to unauthorized methods."

Hopt *vs.* Utah, 110 U. S. 579.
Lewis *vs.* U. S. 146 U. S. 374.

The defendant in this case was denied absolutely the benefit of this doctrine, in the trial court and in the appellate court.

The following provisions of the Criminal Code of Oklahoma are pertinent in this connection, as showing what the law made "essential" in the proceedings against New:

"Section 1838. No act shall be deemed criminal or punishable except as provided or authorized by this code."

"Sec. 1844. The punishments inflicted by this code can be inflicted only upon a legal conviction in a court having jurisdiction."

To the same effect is section 4861.

"Sec. 1845. Whenever a crime is distinguishable into degrees, the jury, if they convict the prisoner, shall find the degree of crime of which he is guilty."

"Sec. 1847. The several sections of this code which declare certain crimes to be punishable devolve a duty on the court authorized to pass sentences to determine and impose the punishment prescribed."

"Sec. 5132. The plea of not guilty puts in issue every material allegation in the indictment."

"Sec. 5133. All matters of fact tending to establish a defence other than that specified in the third subdivision of section 5127 (former acquittal or conviction) may be given in evidence."

"Sec. 5202. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lower of such degrees only."

"Sec. 5247. When a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

"Sec. 5248. The jury may find the defendant

guilty of any offense the commission of which is included in that with which the defendant is charged in the indictment or of an attempt to commit the offense."

"Sec. 5227. Upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable."

"Sec. 5146. Issues of fact must be tried by a jury."

"Sec. 5197. The court must decide all questions of law which arise in the course of the trial."

"Sec. 5230. In charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict," etc.

"Sec. 5318. An appeal to the Supreme Court may be taken by the defendant as matter of right from any judgment against him, and upon the appeal any decision of the court made in the progress of the case may be reviewed."

"Sec. 5267. Exceptions may be taken by either party to the decision of a court or judge upon a matter of law. First. In granting or refusing a motion in arrest of judgment. Second. In granting or refusing a motion for a new trial."

Section 5258 provides that in a criminal prosecution by indictment exceptions may be taken to the decision of the court—

"On any question of law not a matter of discretion, or in charging or instructing the jury on the trial of the issue or any other matter prejudicial to the rights of the defendant."

If a killing in self-defense was not made out at the trial of the plaintiff in error, the fact that there was evidence in it which tended strongly to show the lower grade of offense admits of no question.

In Collins *vs.* United States, 150 U. S. 62, the defendant was indicted for murder; the killing took place under the following circumstances: At a dance, a boy, a half brother of the defendant, was attending a soda-pop or confectionery stand; the deceased, who was quite drunk, took a bottle of soda-pop, and refused to pay for it; some words passed between deceased and the boy and deceased slapped the boy with his open hand; the boy ran away and deceased followed him; seeing the controversy, the defendant left his place in the dance and went after his pistol, and after getting it came near to the deceased and without a word shot him and he sunk to the floor. The defendant then turned and walked away but in a few minutes returned, and, seeing the wounded man on the floor said, "I have pretty near killed him, I might as well finish him," and then put the pistol close to the head of the deceased and fired a second time. After this, defendant walked off and fled from Ft. Gibson, where the shooting had taken place.

It was held by the court that:

> "The facts of this case presented a proper question for the consideration of the jury as to whether the homicide was murder or manslaughter."

See also Bird *vs.* United States, 180 U. S. 361.

The case of Potter *vs.* State, 85 Tenn. 97, is directly in point as to the contention of plaintiff in error, that it was the duty of the court to have charged the jury as to manslaughter, although not in terms requested to do so.

In that case there were threats and acts of deceased tending to excite apprehension in the mind of the defendant, and the court held that the omission to charge the jury in respect of this aspect of the case was "as fatal an error as it would have been to have charged it incorrectly."

The verdict, say the court—

> "can not negative the existence of a defense the jury was not properly instructed to consider, and we are not satisfied to hold that the facts sustain a ver-

dict which is not the result of the deliberate judgment of the jury after a full, fair, and proper exposition of the law in a case involving the life of the citizen or his hopeless consignment to servitude and infamy. In such case this court would not stand upon any too nice technicality of requiring the defendant to have demanded any instruction essential to a fair trial, which the law is supposed to guarantee to him without a demand, in order that he should be entitled to it.

"It is the duty of the circuit judge to charge the law applicable to the evidence, and give the defendant the benefit (1 Lea, 293) of it, and not to decide for himself the case he supposes to be made out, and apply the law to such suppositious case and leave to the jury only that for decision, and to us to speculate on its effect and the possible injury or want of injury done the defendant."

The views of the Tennessee court are in harmony with the views of this court in the case of Hopt *vs.* State and Lewis *vs.* State, *supra*; the views of the Supreme Court of the Territory in New's case are not.

The latter court say (Rec. p. 122), in passing upon the case of New:

"It is in the province of the court to determine whether there is or is not any evidence which tends to prove the lower degree of crime, *and where the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury, if requested, upon such lower degree.*"

The court then recites the facts and upon the recital holds that there was no evidence tending to prove a lesser grade of offence than that charged (Rec. pp. 122–124). That the conclusion was erroneous is obvious upon the face of the recital. This action of the court was in contravention of the decisions of this court above cited and of the previous decision of the court itself in Lawson *vs.* Oklahoma, 8 Ok. 1,

in which heat of passion was held to be sufficient under proper circumstances to reduce a killing to manslaughter.

The court said in the case:

> "Section 2086 of our statutes provides that 'homicide is manslaughter in the first degree. . . . Third, where perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed.' There was some evidence from which the jury might have said that the defendant was only guilty of one of the degrees of manslaughter."

The only one of the contingencies mentioned in section 2078 of moment here, under which a homicide is declared to be murder, is the following:

> "First. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed."

The word "premeditated" as thus used does not indicate anything different from the "malice aforethought" of the common law when applied to express intent to take life. A "premeditated design to effect death" simply means express malice.

> 1 McClain's Crim. Law, sec. 358.
> State *vs.* Dale, 108 Mo.
> People *vs.* Enoch, 13 Wend. 159.

Hence, section 2078 does not include cases where the killing is unlawful, but intentional, and is done in terror, unreasonably excited, or in heat of passion, for which there was reasonable provocation, and which would have been manslaughter at common law, because of the absence of malice.

By section 2086, which is to be considered in connection with section 2078, homicide is manslaughter in the first degree in three cases, in two of which the homicide is per-

petrated "without a design to effect death." The third is stated in the quotation from Lawson, above.

This section could not have been intended, as might be inferred from the naked import of the language used, to reduce a homicide from murder to manslaughter, merely because the deceased was attempting to commit some offense, where the slayer knew the killing was unnecessary, and much less after the attempt had failed, as he knew. It can only be given a sensible construction by the application of the common law doctrine of manslaughter, of killing in the heat of passion.

This is apparently recognized by the Supreme Court of the Territory in the case of Lawson, *supra*, where it is held that "heat of passion" may reduce a charge of murder. The county attorney and the grand jury seem to have taken this view by putting in terms the question of malice in issue through the averments of the indictment which charge "a wilful, malicious, and felonious" killing.

Furthermore, section 3874 of the statutes of the Territory (1893) puts in force the common law as modified by constitutional law, statutory law, judicial decisions, and the conditions and wants of the people, and section 4870 requires the "proceedings, practice, and pleading" to be in accordance with the common law, in criminal actions or matters of a criminal nature, where not specifically provided for by the statute. By section 9 of the organic act it is provided that the territorial courts—

> "shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property."

The common law must therefore be the rule when other rules are lacking.

4. Calling the Attention of the Trial Court by the Motion for a New Trial to the Prejudicial Omission to Instruct as to Manslaughter Was Timely Under the Territorial Laws, and the Motion Should Have Been Granted.

Section 5267 of the Oklahoma statutes (1893) provides that an exception may be taken to the overruling of a motion for a new trial. The motion made in this case assigned as one of its grounds that the trial court erred in failing to charge the jury as to manslaughter (Rec. p. 106); and the exception taken to the overruling of the motion made this action of the court a matter for review, under sections 5318 and 5330 of the territorial laws.

If there was evidence in the case tending to show that the offense committed was manslaughter, the jury should not have been precluded by the trial court from such a finding and limited to the finding of murder, the higher grade of homicide, or acquittal.

The trial court having had its attention called by the motion to the disregard of the defendant's rights, should have corrected the evil in the only way possible, by granting a new trial; it follows that the Supreme Court of the Territory erred in not so holding.

5. The Trial Court Was Without Jurisdiction to Try the Case.

The legislature of the Territory was without power to enact the law under which the prosecution was had, for which reason the law was null and void.

The Territory of Oklahoma is a municipal corporation created by the sovereign United States as an aid in the matter of municipal rule.

The act of Congress approved May 2, 1890, chap. 182, 26 Stat. 81, by which only its existence is justified, does not

indicate that there was any intention on the part of Congress to abdicate the sovereignty of the United States over the Territory included or people living within its limits, or to create a new legislative power within those limits, which should supersede or even stand upon the same plane of authority as that of the United States, even if it were competent for Congress to have done either.

The act clearly contemplates that the municipality should be restricted in its powers of legislation to such other subjects and conditions as had not been already provided for by the Constitution and laws of the United States.

Such legislative power as is conferred by the act is granted by section 6, and this is specifically confined—

> "to all rightful subjects of legislation *not inconsistent* with the Constitution and laws of the United States,"

and by section 28 of the act it is provided that:

> "The Constitution and *all* laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States."

At the time of the passage of the organic act there were in force in the territory included within the limits of Oklahoma certain laws of the United States which covered specifically the offenses of murder and manslaughter when committed "in a place or district of country under the exclusive jurisdiction of the United States." The laws of the United States to which reference is had are sections 5339 and 5341 of the Revised Statutes. The organic act does not repeal them in terms. It emphasizes the fact that Congress intended that they should continue in force.

The provision of the organic act making the criminal Code of Nebraska operative in the Territory until the end of the first session of the legislative assembly does not operate as a repeal by implication. The import of the provision is

that the Nebraska Code should be in force only where not inconsistent with the laws of the United States.

To that effect is the decision in Ex parte Larkin, 1 Ok. 53, where the court said:

> "It was intended by Congress that the laws of Nebraska should constitute a territorial code, *as distinguished from the laws of the United States in force* in the Territory of Oklahoma, and that they should sustain the same relation to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

This statement was approved in United States *vs.* Pridgeon, 153 U. S. 48.

The merest comparison of sections 5339 and 5341, R. S. U. S., with sections 2078 and 2086 of the laws enacted by the Territory, shows that the latter are irreconcilably inconsistent with the former.

The question presented in the case at bar is the same as that presented in Goodson *vs.* United States, 7 Ok. 117. In the case of Goodson there was a statute of the United States and a statute passed by the Territory, each of which covered the offense charged. The defendant's contention, as stated by the court, was:

> "That when Congress created the Territory of Oklahoma and authorized the legislature of the Territory to legislate on all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, the United States *surrendered* its jurisdiction over all crimes not strictly pertaining to federal matters and delegated to the Territory the right to define crimes and punish violations of its laws committed at any place within the borders of the Territory, and that defendant should have been indicted in the territorial court under the laws of Oklahoma."

The contention was held to be unfounded, the court saying (Rec. p. 138):

> "The legislative power does not extend to a right to repeal a law of Congress. There is nothing in the organic act which in itself repeals the laws of the United States, making certain acts criminal when committed in the Indian country, and it can only be by reason of the fact that the legislature of the Territory has passed laws defining the same offenses that it is claimed that such repeal is effected. There might be stronger grounds for this contention were it not for the fact that the legislative power of the Territory is limited to all rightful subjects not inconsistent with the laws of the United States. It would not be contended that had the Oklahoma legislature never passed any laws making these same offenses criminal and punishable, the laws of the United States are not still effective for punishing such crimes committed in the Indian reservations within the Territory."

See also Allen v Reed 60 Pac. 785-7.

No more can it be contended that if the legislative assembly had passed no statute on the subject of murder and manslaughter, the offenses would not be punishable in the Territory under sections 5339 and 5341, R. S. U. S.

In reference to the limitation on the power of the legislature of the Territory, by the organic act, the court (p. 135) further say:

> "And Congress by this limitation on the legislative power of the Territory, withheld from the Territory the authority to legislate on such matters as it had already made provision for."

The court, referring to the case of Pridgeon, say, that in the views expressed, there is no conflict with those expressed by this court in that case.

It follows that if plaintiff in error, in killing Doyle, committed either the offense of murder or of manslaughter, he

should have been indicted and tried under the laws of the United States and not under the laws of the Territory.

Because of lack of jurisdiction in the trial court the decision of the Supreme Court of the Territory should be reversed and the case remanded with instructions to quash the indictment for lack of such jurisdiction.

If the opinion of this court should be otherwise, and it should be of opinion that either one or all of the other propositions contended for by plaintiff in error are well founded, the decision of the Supreme Court of the Territory should be reversed and the case remanded with directions to grant a new trial.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.